

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOSHUA MICHAEL DELEON,

Plaintiff-Appellee,

v

LYDA JANELL DAVIS,

Defendant-Appellant.

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UNPUBLISHED

March 17, 2011

No. 300353

Ingham Circuit Court

Family Division

LC No. 09-001593-DC

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant appeals as of right the order denying her motion for summary disposition brought pursuant to MCR 2.116(C)(7) (lack of subject matter jurisdiction) in this child custody dispute. We affirm but remand for further proceedings consistent with this opinion.

**I. FACTS AND PROCEDURAL HISTORY**

Plaintiff Joshua Michael Deleon and defendant Lyda Janell Davis were residents of North Carolina and were granted a judgment of divorce in that state on February 20, 2008. The parties were awarded joint legal custody the parties' child, with physical custody awarded to defendant. Plaintiff was awarded unlimited visitation.

At the time this action commenced, both plaintiff and defendant were serving in the United States Marine Corp. According to plaintiff's May 18, 2009,<sup>1</sup> complaint for custody, he had physical custody of the child beginning July 27, 2008, when defendant deployed overseas. Plaintiff moved to Michigan on November 18, 2008, in connection with his job. On January 25, 2009, plaintiff temporarily returned to North Carolina for specialized military training. Defendant returned to North Carolina from her deployment the first week of February 2009, and spent considerable time with the child for three weeks before the child returned to Michigan with plaintiff on March 6, 2009. Plaintiff alleged that defendant had informed him that she was going

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<sup>1</sup> The summons and complaint was served on defendant by certified mail on June 9, 2009.

to move to Hawaii and marry a marine stationed there, and that she intended to pick the child up on May 22, 2009, to move to Hawaii.

Plaintiff's complaint alleged that the child had an established custodial environment with plaintiff that began on July 27, 2008, and that Michigan is the child's home state for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").<sup>2</sup> In an order entered on May 19, 2009, the trial court ordered that the matter be referred to the friend of the court for conciliation. A conciliation conference was conducted on June 8, 2009, with defendant attending via telephone. The parties were unable to reach an agreement regarding custody. The conciliator recommended that the parties share joint legal custody of the child and that plaintiff have primary physical custody. On July 9, 2009, the trial court, noting that neither party filed objections to the recommendation, ordered that the "recommendation of the Friend of the Court is hereby made the Order of this Court."

On May 13, 2010, defendant moved to vacate the order and to dismiss for lack of jurisdiction. She alleged that she was unaware that the conciliation hearing concerned the issue of custody. She alleged, *inter alia*, that she lived in and had significant connections with North Carolina on May 18, 2009, and that North Carolina had exclusive, continuing jurisdiction of the child custody determination under the UCCJEA. Thus, she contended that Michigan lacked subject matter jurisdiction at the time the complaint was filed.

In answer to the motion, plaintiff denied that defendant was living in North Carolina on May 18, 2009. He asserted that defendant and her fiancé had moved to Pennsylvania sometime before May 5, 2009, and were living in Pennsylvania with relatives while preparing to get married and move to Hawaii. Plaintiff also denied defendant's allegation that she was unaware before the conciliation hearing that plaintiff wanted custody of the child.

Defendant moved for summary disposition pursuant on July 26, 2010. In relevant part, defendant alleged that plaintiff moved to Michigan on November 15, 2008, and took the child with him without obtaining an order from the North Carolina court changing custody or domicile, or without North Carolina determining that it no longer had exclusive, continuing jurisdiction or that Michigan would be a more convenient forum under MCL 722.1203. Defendant also asserted that she was residing in North Carolina at the time plaintiff filed this action. Defendant maintained that North Carolina had exclusive, continuing jurisdiction under MCL 722.1202 of the UCCJEA at the time plaintiff filed this action in Michigan. Defendant sought to have the July 9, 2009, order vacated and the case dismissed for lack of subject matter jurisdiction.

A hearing was held on defendant's motion for summary disposition on August 26, 2010. At the time of the hearing, defendant had been living in Hawaii for 13 months and the child was

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<sup>2</sup> Under MCL 722.1102(g) of the UCCJEA, "Home state" means the state in which a child lived with a parent . . . for at least 6 consecutive months. . . . A period of temporary absence of a parent . . . is included as a part of the period.

with defendant in Hawaii pursuant to the trial court's parenting time provision. Defense counsel argued that North Carolina had exclusive, continuing jurisdiction as defendant continued to reside in North Carolina until July 2009. Plaintiff's counsel disagreed, and noted that plaintiff presented an affidavit containing facts indicating that neither parent nor the child lived in the state of North Carolina at the time the complaint for custody was filed in Michigan. Thus, plaintiff maintained that Michigan could make a determination that the North Carolina court no longer had exclusive continuing jurisdiction and thereby exercise jurisdiction under the UCCJEA.

The trial court recognized the factual dispute with regard to defendant's residence at the time plaintiff commenced this action, as well as the court's inability to resolve the factual dispute. The court opined that:

that's a factual determination that probably needs to be made by, I would think, the North Carolina court, because I can't tell from here. "A court of this state or a court of another state determines that neither the child, nor a parent of the child, nor a person acting as the child's parent presently resides in this state. A court of this state [that] has exclusive, continuing jurisdiction under this section may decline to exercise its jurisdiction if the court determines that it is an inconvenient forum . . . ." So even if the North Carolina court concludes that it's an inconvenient forum to litigate a custody action, then that court, regardless of whether or not mom lived in North Carolina, could decline jurisdiction.

\* \* \*

All right. So we're back in a circle again. So what I need to do, which should have been done more than a year ago, is that I need to call the judge in North Carolina and set up a hearing whereby that court can make a determination as to whether or not it's going to exercise its exclusive jurisdiction or not. So I'm going to call the judge, whoever the judge is down there that's covering the docket, get a feel for what kind of schedule we can set up, and then we'll have a hearing. Your client can be here. You know, I can have the judge on by phone here. . . . But it's that court that has to make the decision to decline exclusive jurisdiction. And one that court, if that court does that, either by way of an evidentiary hearing or on its own motion, that this court, I believe, will retain jurisdiction regardless of whether or not – cause this, this presupposes that something was going to happen after the filing of an action here. So even though we're – I agree that the temporary order here was issued without following this procedure which should have been followed. It's not going to affect this Court's ability to make a determination once North Carolina decides what they'd like to do.

The trial court denied defendant's motion for summary disposition in an order entered on September 1, 2010, which provided:

A hearing having been held on Defendant's Motion for Summary Disposition on August 26, 2010, this Court having subsequently having had a

telephone conversation with Judge Carol Jones Wilson, Judge Presiding, Onslow County District Court, and said Judge Wilson having issued the attached Order Declining Jurisdiction in North Carolina, and the Court being otherwise duly advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's motion is denied for the reasons stated on the record.

Attached to the trial court's order was the "Order Declining Jurisdiction" from the North Carolina Court. The order provides in relevant part:

This Court obtained jurisdiction in this matter January 2008 when Plaintiff filed her complaint and this Court maintained its jurisdiction by entering an Order of Divorce and Custody on the 20<sup>th</sup> day of February 2008. Defendant moved to Michigan sometime in 2008 and the child has lived there with him for over 12 months. The child moved there with the Defendant while the Plaintiff was deployed with the military. Michigan is currently the home state of the child. The Plaintiff moved away from North Carolina in 2009 and currently resides in Hawaii.

The Defendant filed a complaint for Custody in Michigan in 2009. Both parties participated in the hearing/mediation on the matter of custody in Michigan and primary custody was granted to the Defendant.

The issue of jurisdiction has since been raised in Michigan.

This Court concludes that the North Carolina court is an inconvenient forum for the continued exercise of jurisdiction over this action and it is not in the child's best interest to continue exercising jurisdiction and that the court of Michigan is a more appropriate forum. This Court further concludes that the child and the child's parents do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships. This Court also concludes that the child and the child's parents do not reside in this State.

Therefore, this Court declines to exercise its continuing jurisdiction in this matter.

## II. STANDARD OF REVIEW

Whether a trial court has subject-matter jurisdiction presents a question of law that this Court reviews de novo. However, the determination whether to exercise jurisdiction under the UCCJEA [is] within the discretion of the trial court and will not be reversed absent an abuse of that discretion. *Nash v Salter*, 280 Mich App 104, 108; 760 NW2d 612 (2008). Generally, an appellate court should defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Jamil v Jahan*, 280 Mich App 92, 100; 760 NW2d 266 (2008). In addition, this court reviews issues of statutory construction de novo as questions of law. *Nash*, 280 Mich App at 108-109.

### III. ANALYSIS

The trial court ruled that it had subject-matter jurisdiction to modify custody in this matter because the North Carolina court declined to exercise its exclusive, continuing jurisdiction.<sup>3</sup> MCL 722.1202 provides for the retention of exclusive, continuing jurisdiction for the state that entered the custody decree. *Atchison v Atchison*, 256 Mich App 531, 538; 664 NW2d 249 (2003). MCL 722.1202 states, in relevant part:

(1) Except as provided in section 204 [MCL 722.1204], a court of this state that has made a child-custody determination consistent with section 201 [MCL 722.1201] or 203 [MCL 722.1203] has exclusive, continuing jurisdiction over the child-custody determination until either of the following occurs:

(a) A court of this state determines that neither the child, nor the child and 1 parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.

(b) A court of this state or a court of another state determines that neither the child, nor a parent of the child, nor a person acting as the child's parent presently resides in this state.

(2) A court of this state that has exclusive, continuing jurisdiction under this section may decline to exercise its jurisdiction if the court determines that it is an inconvenient forum under section 207 [MCL 722.1207].

Thus, North Carolina, as the court that made the initial custody determination, had exclusive, continuing jurisdiction over the child custody determination until one of the events set forth in MCL 722.1202(1) or (2) occurs.

MCL 722.1203 provides with regard to modification of a child custody determination made by a court of another state:

Except as otherwise provided in section 204 [MCL 722.1204], a court of this state shall not modify a child-custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial child-custody determination under section 201(1)(a) or (b) and either of the following applies:

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<sup>3</sup> The trial court also noted that, if this court were to affirm the court's exercise of jurisdiction, the court would conduct a full custody hearing.

(a) The court of the other state determines it no longer has exclusive, continuing jurisdiction under section 202 [MCL 711.1202] or that a court of this state would be a more convenient forum under section 207.

(b) A court of this state or a court of the other state determines that neither the child, nor a parent of the child, nor a person acting as a parent presently resides in the other state.

Because a North Carolina court had made the initial child custody determination, Michigan would not have jurisdiction to modify the North Carolina child custody determination unless it had jurisdiction to make an initial child custody determination and (1) North Carolina determined that it no longer had exclusive, continuing jurisdiction or that a court of this state would be a more convenient forum under section 207<sup>4</sup>, or (2) until a court of this state or a court of North Carolina determined that neither the child, nor a parent of the child, nor a person acting as a parent presently resides in North Carolina.

It is apparent that neither MCL 722.1203(a) or (b) was satisfied at the time the trial court entered the order modifying custody. This Court cannot necessarily fault the trial court for exercising jurisdiction however, because jurisdiction in Michigan was not challenged at the time of the June 2009 conciliation hearing, and no objections to the conciliator's recommendations were filed. Indeed, the trial court noted, at the time of the August 2010 hearing on the motion to vacate order and dismiss for lack of jurisdiction, that the Michigan court could have contacted the North Carolina court before exercising jurisdiction in 2009 in order to allow the North Carolina court to determine whether it wished to exercise its exclusive, continuing jurisdiction in this custody dispute.

The conundrum is that there is no way to determine at this point whether North Carolina would have exercised its exclusive, continuing jurisdiction at the time the complaint was filed in Michigan on May 18, 2009. At that time, the child had been in plaintiff's custody since July 2008 and had resided with plaintiff in Michigan since November 18, 2008. Even assuming that defendant resided in North Carolina on May 18, 2009, it is undisputed that defendant intended to relocate to Hawaii in June 2009. Under these circumstances, the North Carolina court could have declined to exercise its exclusive, continuing jurisdiction at that time on the ground that that a Michigan court is the more convenient forum for resolution of this matter. MCL 722.1202(2). Nonetheless, the situation remains that plaintiff and the child have now resided in Michigan since November 2008, and defendant has resided in Hawaii since late June or early July 2009. North Carolina has since determined that the North Carolina court is an inconvenient forum for the continued exercise of jurisdiction over this action, that it is not in the child's best interest to continue exercising jurisdiction, and that the court of Michigan is a more appropriate forum. The North Carolina court further concluded that the child and the child's parents do not have a significant connection with North Carolina, that substantial evidence is no longer available in

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<sup>4</sup> MCL 722.1207

that state concerning the child's care, protection, training, and personal relationships, and that the child and the child's parents do not reside in North Carolina.

Under these circumstances, we affirm the trial court's order denying defendant's motion to dismiss for lack of jurisdiction.<sup>5</sup> Modification of the child custody determination is permissible because Michigan currently has obtained jurisdiction to make an initial child custody determination under section 201(1)(a),<sup>6</sup> and the North Carolina court has now declined to exercise its exclusive, continuing jurisdiction and has determined that neither the child nor a parent of the child resides in North Carolina. Since Michigan has now obtained jurisdiction under MCL 722.1203(a) and (b), we remand this case to the trial court to conduct a de novo hearing to resolve the custody dispute in the child's best interest, as measured by the factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001).<sup>7</sup> We do not retain jurisdiction. We affirm but remand for further proceedings consistent with this opinion.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

/s/ Patrick M. Meter

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<sup>5</sup> Additionally, reversal of the trial court's order would undoubtedly result in plaintiff immediately refiling the motion for custody in Michigan.

<sup>6</sup> Michigan is currently the home state of the child, MCL 722.1201(1)(a), since the child has resided with plaintiff in this state for more than six months. MCL 722.1102.

<sup>7</sup> The trial court properly noted that a full custody hearing must be conducted if this Court determines that Michigan has jurisdiction in this child custody dispute.